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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 341

VERNON ZIMMERMAN, *Petitioner*

v.

MISSISSIPPI VALLEY BARGE LINE, CO., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered on May 14, 1964, affirming the judgment of the United States District Court for the Western District of Pennsylvania entered on February 27, 1963.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania is set forth at pages 24-32 of Appendix A of petitioner's brief. The opinion of the United States Court of Appeals for the Third Circuit is reported at 331 F.2d 308.

QUESTION PRESENTED

Whether the decision of the Court of Appeals is in substantial conflict with decisions of other Circuits relating to the admission into evidence and use of records under the Federal Shop Book Statute.

STATUTES INVOLVED

(1) The Jones Act, The Act of June 5, 1920, c. 250 § 33, 41 Stat. 1007, Title 46 U. S. C. § 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

(2) United States Business Records as Evidence Statute:

> Title 28 U. S. C. § 1732.
>
> Record made in regular course of business photographic copies.
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or

record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

STATEMENT

Petitioner brought his action in the United States District Court for the Western District of Pennsylvania for injuries allegedly received when he stepped into a hole on a barge owned by respondent. The claim was based on the Jones Act, 46 U.S.C.A. § 688, unseaworthiness under maritime law and for maintenance and cure.

Petitioner sustained a sprain of his left knee and a contusion of the right elbow, and he claimed that he also sustained a compression fracture of the second lumbar vertebra. Respondent contended and produced evidence intended to establish that the compression fracture antedated the accident. (App. A of Petition, 26)

The day following the accident, petitioner was admitted to the Mason District Hospital at Havana, Illinois. X-rays of his knee, lumbar spine and pelvis were taken and he was released the same day. On March 31, 1960, he was admitted to the United States Public Health Service Hospital at Memphis, Tennessee, from which he received a disciplinary discharge on April 6, 1960. From April 18, 1960 through March

of 1961 petitioner was employed at various times as a deckhand and truck driver. While so employed, on July 27, 1960, he injured his eye for which he received maintenance and cure through November 17, 1960. As of December 31, 1963, he was employed as a pilot on a vessel (App. A of Petition, 26).

From March [illegible], 1960 to June 10, 1960, respondent made payments to petitioner totaling $441.00 (R-292). In June 17, 1960 respondent paid petitioner $800.00 and petitioner signed a release, stated to be in the amount of $1,241.00, of all claims arising from the accident (App. A of Petition, 26).

Respondent admitted that the vessel in question was unseaworthy and pleaded the release in bar of petitioner's claims.

The trial Judge instructed the jury that as a matter of law the petitioner was entitled to be compensated for whatever injuries he sustained as a result of the accident (R 362-363), specifying that the petitioner was entitled to recover, as elements of damage, maintenance and cure, lost wages to the time of trial, loss of future earning power, and pain, suffering and inconvenience, and the court described for the jury the standards to be applied in connection with each of the various items of damage (App. A of Petition, 27).

In its answer to complaint, in its pretrial statement, in answers to interrogatories, and at the pretrial conference respondent fully disclosed to petitioner that it was relying upon settlement and release as a defense to his various claims. (App. A of Petition, 30).

The court made a tentative ruling at the beginning of the trial in response to a motion by petitioner, and over respondent's vigorous objection, to try the maintenance and cure claims without a jury (App. A of

Petition, 31). However, at the close of the evidence, the Judge inquired of both counsel if there was any evidence to go before the jury if the maintenance and cure claim were to be submitted to the jury. There was none. In light of this, the court changed its previous ruling and decided to submit the question of maintenance and cure to the jury as being a necessary part of determining the validity of the release. Petitioner offered no objection (R 341).

The jury returned a verdict in favor of respondent. Petitioner's motion for a new trial was denied and the Circuit Court of Appeals affirmed.

ARGUMENT

I. The Decision of the Court of Appeals for the Third Circuit Is Not in Conflict With the Decisions of Another Court of Appeals on the Same Matter.

In an effort to gain favorable consideration of his petition, the petitioner has argued that a conflict exists in the decisions of various Courts of Appeals relating to the application of the Federal Shop-Book Act, 28 USCA § 1732. However, the claimed conflict in no way relates to the case at bar

While the petitioner argued before the Court of Appeals that certain entries of the U.S.P.H.S. hospital record were inadmissible, the Court did not render a decision on this point. Instead, in its Per Curiam Opinion, the Court stated (App. D of Petition):

> "We are convinced that no prejudicial error occurred in the preceding below."

Thus, the issue of admissibility of hospital record entries under the Federal Shop-Book Act was not squarely passed upon. Rather, the opinion of the

Court of Appeals held that if error existed, it was not prejudicial.

Petitioner cited previous decisions of the Court of Appeals for the Third Circuit, *Bartkoski* v. *Pgh. and Lake-Erie R.R. Co.*, 3 Cir., 1949, 172 F2d 1007, and *Norwood* v. *Great American Indemnity Co.*, 3 Cir., 1944, 1946 F2d 797, in an attempt to bolster his argument of a conflict between Circuits. A reading of these cases clearly shows that no conflict existed as claimed prior to the decision in the case at bar. Furthermore, even if the claimed conflict did exist previous to the decision in question, the statement of this Court in *The Monrosa* v. *Carbon Black, Inc.*, 1959, 359 U.S. 180, 184 79 S. Ct. 710, 3 L.Ed.2d 723, rehearing denied 359 U.S. 999, 79 S. Ct. 1115, 3 L.Ed.2d 986 in dismissing a writ as being improvidently granted is applicable:

> "While the Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue of conflict among the Circuits] can wait a day when the issues is posed less abstractly."

II. The Decision of the Court of Appeals was Correct.

Petitioner's arguments relating to the admission of unauthenticated X-rays and claimed errors in the charge of the trial court were exhaustively briefed and argued before the District and Circuit Courts. Respondent contended below that the X-rays were properly authenticated and, if any error existed, it would be harmless because of lack of timely objection. Petitioner's argument relating to claimed errors in the trial court's charge was met by the statement that the

charge must be considered in its entirety and the extent of the amplifications in the charge rest within the trial Judge's discretion. *U. S.* v. *Bayer*, 1947, 331 U.S. 532, 536, 67 S. Ct. 1394, 91 L.Ed. 1654.

Petitioner's contentions relating to the claimed errors in the trial court's instructions as to maintenance and cure and the doctrine of seaworthiness and Jones Act are wholly without merit. The instructions were in accord with the nature of a seaman's rights set out in *Pacific Steamship Co.* v. *Peterson*, 1928, 278 U.S. 130, 138, 49 S. Ct. 75, 77, 73 L.Ed. 220, and petitioner has otherwise failed to show that they were other than in accord with established law.

The Petition in this case indicates that there were many areas of disagreement throughout the course of the trial, credibility was very much an issue, and that the trial was spiritedly contested. The opinion of the Circuit Court acknowledges this by its statement that no prejudicial error existed.

Petitioner has failed to show any compelling reason why this court should grant certiorari. His petition simply challenges the correctness of the Court of Appeals decision that if error existed, it was not prejudicial. This is not a basis for granting the writ.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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GILES J. GACA
Attorneys for Respondent

August 27, 1964